In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

No. 44, Original

STATE OF TEXAS, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

MEMORANDUM FOR THE DEFENDANT IN OPPOSITION TO INTERVENTION BY THE NEW YORK CITY BOARD OF ELECTIONS

1. Each of these actions seeks a judgment declaring that the federal statute which lowers the minimum voting age, Title III of the Voting Rights Act, as amended, 84 Stat. 318, is unconstitutional and an injunction prohibiting the Attorney General of the United States from enforcing the provisions of Title III. On September 10, 1970, the New York City

405-185—70

Board of Elections (hereinafter referred to as the "Board") filed a motion to intervene as defendant in each of these actions.

We submit that the motion to intervene should be denied and that the Board's brief regarding the constitutionality of Title III could properly be treated as the brief of an *amicus curiae* (see Rule 42(4) of the Rules of this Court).

2. The interest which the Board purports to represent in this case is not sufficient to warrant its intervention. Where a political subdivision of a state seeks to intervene in an original action to which the state is already a party, the subdivision has "the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373; see also *Kentucky* v. *Indiana*, 281 U.S. 163. The only interest which the Board seeks to represent here is a citizen interest, the interest of persons between the ages of eighteen and twenty-one in voting.[1] It claims the right to en-

[1] Although the Board alleges a separate interest in the outcome of litigation pending in the District of Columbia courts, that interest necessarily takes its coloration from the interests asserted by the Board in that litigation. The interests asserted by the Board in the District of Columbia litigation are solely those of the citizens subject to its jurisdiction in voting—interests *parens patriae*, and not in any sense proprietary.

force an alleged constitutional right of those persons to vote which it states the federal government will not fully enforce. This is not a "compelling interest in [its] own right," but an "interest in a class with all other citizens and creatures of the state," and hence will not support intervention.

Intervention is especially inappropriate here, where the alleged rights are conferred by federal law, and the Board's claim is necessarily that the federal government will not adequately protect those interests. This Court has long adhered to the principle that it is no part of the "duty or power" of a state or its political subdivisions to enforce its citizens' rights "in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486; *South Carolina* v. *Katzenbach*, 383 U.S. 301; Brief for the Defendant Opposing the Motion For Leave To File Complaint, *Massachusetts* v. *Laird*, No. 42 Original, pp. 9–13. While here the Board ostensibly seeks to defend citizens' federal rights against the states, its claim of right to intervene requires a determination that the federal government is not adequately protecting those rights. It is that determination which this Court's cases properly forbid.

3. To the extent that there is any difference between the legal arguments of the Board and those

of the United States,[2] this can properly be brought to the Court's attention by the Board as *amicus curiae*. Such differences, in themselves, would not warrant intervention even if the interests the Board sought to protect were sufficient. There is no suggestion that the Board has additional factual material to offer which otherwise will not be brought to the Court's attention. Indeed, the record in these cases is limited to legislative materials and other judicially noticeable matters which have equal application to all the issues raised. Nor is there any question here of the Board's need to intervene in order to preserve the possibility of seeking appellate review of any decision this Court might render. The preservation of legal issues which may not be dealt with fully by the parties, on the other hand, is the primary function of an *amicus curiae* brief. See Rule 42(3) of the rules of this Court. The

[2] The Board's motion to intervene was prepared prior to the filing of the Brief for the United States in *United States* v. *Arizona* and *United States* v. *Idaho*, Nos. 46 and 47, Original. That brief sets forth the position of the United States with respect to the constitutionality of Title III, see pp. 23–39 and pp. 63–76. The Board argues that, even apart from any action by Congress, the Court should hold that denial of the vote to otherwise qualified persons between 18 and 21 years of age violates the Equal Protection Clause.

filing of such a brief adequately protects the interests the Board asserts.[3]

CONCLUSION

For the above reasons, we urge the Court to deny the motion to intervene and to treat the Board's brief on the merits as the brief of an *amicus curiae*.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

SEPTEMBER 1970.

---

[3] Unlike counsel for parties, counsel for an *amicus curiae* has no right to take part in oral argument. See Rule 44(7) of the rules of this Court. In our view, the interest of the Board in this litigation is not materially different from that of other groups which support the validity of Title III. See, *e.g.*, the Brief submitted by citizens for lowering the voting age and others, as *Amicus Curiae*, in *Oregon* v. *Mitchell* and *United States* v. *Arizona*, Nos. 43 and 46, Original, respectively. All such groups seeking participation in oral argument should be placed on equal footing.

U.S. GOVERNMENT PRINTING OFFICE: 1970